IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

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HAROLD B. WILLEY, Clerk

UNITED STEELWORKERS OF AMERICA, CIO, LOCAL 2286, UNITED STEELWORKERS OF AMERICA, CIO, LOCAL 4498, UNITED STEELWORKERS OF AMERICA, CIO, Petitioners	No. 523
v.	MOTION TO DISPENSE WITH PRINTING
UNITED STATES OF AMERICA, AMERICAN LOCOMOTIVE COMPANY, INC. Respondents	

Petitioners hereby move this Court for permission to dispense with the printing of the record herein in connection with the petition for certiorari.

In support of this motion petitioners show as follows:

1. The order of the District Court in this case was entered on December 29, 1952. Notice of Appeal was filed on the same day. On December 30, 1952, the record was filed and the case docketed in the Court of Appeals for the Second Circuit. The record, which was not printed in the Court of Appeals, was filed in this Court on December 31, 1952, at the same time as the petition for certiorari pursuant to 28 USC § 1254(1). Time has obviously been too short to permit printing of the record in this Court prior to the filing of this motion.

2. As stated in the petition for certiorari and the motion to expedite consideration, filed herewith, the order which we seek the Court to review here will, under the terms of the statute, become moot on or before March 2, 1953.

3. The Clerk of the Court has informed counsel for petitioners that the Court will hear argument in the two weeks beginning on January 5, 1952, and for one week beginning on February 2, 1952, and then plans to recess for one month. Any delay in the consideration of the petition for certiorari in order to allow time for the Clerk to print the record will, therefore, substantially preclude this Court from determining whether to grant certiorari in time for the case to be argued and determined prior to March 2, 1952.

4. Counsel for petitioners have submitted to the Clerk 10 mimeographed copies of the record, identical with the record certified by the Clerk of the Court of Appeals, for use by the Court in consideration of the petition for certiorari if this motion be granted. The opinion of the District Court has been

printed as an appendix to the petition for certiorari.

5. Counsel for petitioners will immediately deposit with the Clerk the amount of the estimated fees and printing costs for the preparation of the printed record so that, if certiorari is granted, the record will be printed for use by the Court in consideration of the case on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. ——

UNITED STEELWORKERS OF AMERICA, CIO

LOCAL 2286, UNITED STEELWORKERS OF AMERICA, CIO

LOCAL 4498, UNITED STEELWORKERS OF AMERICA, CIO

v.

UNITED STATES OF AMERICA

AMERICAN LOCOMOTIVE COMPANY, INC.

Respondents

MOTION FOR IMMEDIATE CONSIDERATION OF PETITION FOR CERTIORARI AND TO ADVANCE ARGUMENT

Petitioners hereby move this Court for immediate consideration of the petition for certiorari, filed herewith, and, in the event certiorari is granted, for argument of the case on the merits prior to the Court's scheduled adjournment on January 16, 1953.

In support of this motion counsel for petitioners show to this Court as follows:

1. This case arises out of the issuance of an injunctive order by a Federal District Court under Section 208 of the Labor Management Relations Act, 1947, 29 USC (Supp. V) 178, and involves serious issues as to the constitutionality and interpretation of that section.

2. Under the provisions of Section 209 and 210 of that Act

(29 USC (Supp. V) 179-180) certain administrative actions are required to be performed during a period of 80 days after the injunctive order is issued. At the conclusion of those actions, the Attorney General is required to move the District Court to discharge the injunction and the District Court is required to grant the motion.

3. The District Court here issued a temporary restraining order on December 12, 1952. Under the terms of the statute, therefore, the administrative processes required by the Act to be performed during the period of the injunctive order must be completed by March 2, 1953, at which time the injunction must be discharged.

4. The injunctive orders of the District Court herein have been obeyed by the petitioners. There are no contempt or other auxiliary proceedings which will survive the discharge of the injunction on March 2, 1953.

5. The entire case will, therefore, become moot on March 2, 1953.

6. If this Court should determine to grant certiorari herein, the case can be argued and determined by this Court prior to March 2, 1953, only if the petition is granted promptly.

7. In order to obtain review by this Court of the questions in the case, the petitioners have asked the Court to grant certiorari before the case is considered or decided in the Court of Appeals. If the Court should decline to grant certiorari, the petitioners will be able to prosecute their appeal in the Court of Appeals, in an effort to obtain a decision by that Court prior to March 2, 1953, only if the petition for certiorari is denied promptly.

8. Section 208 of the Act (29 USC (Supp. V) 178) specifically provides for review by the Court of Appeals and by this Court of the 80-day injunctive orders authorized by it.

9. Rule 38 of the Court's rules provides that the respondent shall have a period of 30 days in which to file a brief in opposition to the petition for certiorari and that the petition will not be distributed to the Court by the Clerk until the expiration of such period, or until the right to respond has been waived or the brief in opposition filed. Utilization of this 30-day period, or any substantial portion thereof, will effectively

deny to petitioners any opportunity for review prior to March 2, 1953.

10. The issues here involved were thoroughly briefed and argued in the District Court. The petitioner's intention to petition for certiorari in the event of an adverse decision was made known to the Government's attorneys at the time of the argument in the District Court. A proof copy of the petition was served on the Government's attorneys within 24 hours after the decision of the District Court was filed. No undue disadvantage would be imposed upon the government, therefore, by an order of this Court requiring an early response and by immediate consideration thereafter of the petition.

11. If the petition for certiorari is granted by this Court, the requirements of the Court's schedule would seem to indicate that the case should be heard by the Court prior to its scheduled recess on January 16, if sufficient time for consideration and decision is to remain before the entire proceeding becomes moot on March 2, 1953. As stated above, the issues have already been thoroughly briefed and argued. Accordingly, we suggest that it would not impose an undue burden upon opposing counsel if the case were set for argument during the latter part of the week of January 12, 1953.

CONCLUSION

For the reasons above stated, we respectfully move the Court for prompt consideration of the petition for certiorari herein. In the event certiorari is granted, we respectfully move that the case be set for argument prior to the Court's scheduled adjournment on January 16, 1953.

Respectfully submitted,

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IN THE

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UNITED STEELWORKERS OF AMERICA, CIO

LOCAL 2286, UNITED STEELWORKERS OF AMERICA, CIO

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Petitioners

v.

UNITED STATES OF AMERICA

AMERICAN LOCOMOTIVE COMPANY, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United Steelworkers of America, Local 2286 of the United Steelworkers of America, and Local 4498 of the United Steelworkers of America, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the

Second Circuit to review the orders of the United States District Court for the Western District of New York entered in this case on December 26, 1952, which orders are now pending in the Court of Appeals on appeal by the petitioners from the District Court.

OPINION BELOW

The opinion of the District Court was entered on December 29, 1952. It is not yet reported. It is set forth in full in Appendix A to this petition.

JURISDICTION

The order of the District Court was entered on December 29, 1952. Immediately thereafter, the petitioners docketed their appeal with the United States Court of Appeals for the Second Circuit, where the case is now pending. The case has not been heard, submitted to or decided by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 29 U.S.C. 178 (c).

QUESTIONS PRESENTED

1. Whether the injunctive provisions of Section 208 of the Labor-Management Relations Act, 1947 (29 U.S.C. 178) violate Article III of the Constitution of the United States or the doctrine of separation of powers by imposing on the district courts functions which are not judicial and are not related to any justiciable case or controversy.

2. Whether the "National Emergencies" provisions of the Labor-Management Relations Act, 1947 (29 U.S.C. 176-180) are applicable to a local strike which does not directly involve an entire industry or a substantial portion thereof, but does indirectly have an effect upon such an industry.

3. Whether, in an injunctive proceeding against a union under Section 208 of the Act above referred to, all of the individual members of the Union, none of whom were made parties to the action, may be enjoined from taking action in

connection with the strike wholly independent of the defendant union.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III of the Constitution provides, in pertinent part:

> "SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> "SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; . . .
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Sections 206-210 of the Labor-Management Relations Act of 1947, 29 U.S.C. (Supp. V) 176-180 (hereinafter referred to as the Act) provide as follows:

> "Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall

file a copy of such report with the Service and shall make its contents available to the public.

"Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

"(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

"(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

"Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

"(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

"(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

"(b) In any case, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall not be applicable.

"(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial

Code, as amended (U.S.C., title 29, secs. 346 and 347).

"Sec. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

"(b) Upon issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board or inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

"Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

STATEMENT

I. The Labor Dispute

The United Steelworkers of America, an international labor organization, hereinafter referred to as the Union, is the exclusive bargaining representative of the employees at four plants

owned and operated by the American Locomotive Company (hereinafter referred to as Alco or the Company).[1] Only one of those plants is here involved, the plant at Dunkirk, New York.

The collective bargaining agreement between the Company and the Union covering the Dunkirk plant expired on January 31, 1952. In negotiations during the month of December, 1951, the Company and the Union were unable to reach agreement on the terms of a new contract and a strike was threatened for January 31, 1952.

On December 22 and 29, 1951, the President certified to the Wage Stabilization Board, under the terms of Executive Order 10233 (16 F. R. 3503), the labor disputes between the Union and the companies in the basic steel industry. Among the disputes so certified were the disputes between the Union and Alco at all of its four plants. The Union and the companies involved in the basic steel dispute agreed to submit their dispute to the Wage Stabilization Board and acceded to the President's request that they maintain uninterrupted production while the Board's proceedings were conducted.

Only one of American Locomotive's plants—the plant at Latrobe—was directly engaged in the basic steel industry. The Union, however, contended that the other plants should follow the same wage pattern. In preliminary hearings before the Wage Stabilization Board, it was decided that only the Latrobe plant of the Company would be considered by the Board in its hearings on the basic steel industry and that the issues with respect to the other plants—Dunkirk, Schenectady and Auburn—would be heard after the main steel case was completed. While the basic steel case was under consideration by the Board, therefore, additional negotiations between the Company and the Union with respect to these three plants took place in an effort to settle the dispute. No agreement was reached.

The Wage Stabilization Board issued its recommendations in the basic steel case on March 20, 1952. Then, in May of 1952, the Board began its consideration of the deferred Ameri-

[1] The four plants are at Schenectady, Auburn, and Dunkirk, New York, and at Latrobe, Pennsylvania. There is a fifth plant operated by a wholly owned subsidiary at Beaumont, Texas.

can Locomotive Company cases. Hearings before a panel of the Board were concluded on June 27, 1952. Before the panel was able to make its recommendations, however, the Defense Production Act was amended to abolish the disputes function of the Wage Stabilization Board. Negotiations between the Company and the Union continued thereafter, without result.

All during this period, the Union had—at the request of the various government agencies involved—refrained from exercising its right to strike, although all the strike notices required by Section 8(d) of the Act had been filed in November and December of 1951, and although its contract with the Company had expired in January, 1952.

Finally, seven months after its contract with the Company had expired, the Union felt that it had no alternative other than to strike. The strike began at Dunkirk on August 29, 1952. It was entirely peaceful and there has never been any claim that any law, state or federal, statutory or common, has been violated with respect either to the objectives of the strike or the manner in which it was conducted.

II. The Industrial Effect of the Strike

The Dunkirk plant as stated above, is only one of 4 plants owned and operated by the American Locomotive Company. At this plant the Company is engaged, in its own words, in the "heat exchanger, pressure vessel and prefabricated pipe industry."[8] It manufactures: (1) custom-engineered heat transfer equipment; (2) a variety of products made from heavy fabricated plate steel such as kilns, pressure vessels, tanks, etc.; (3) water pipe, oil and gas transmission lines; (4) weldments, such as pump blocks for the nylon industry, sodium cells for the sodium industry and generator adapters for diesel engines; (5) large metal containers such as those used for the storage and transportation of aircraft engines and torpedoes; and (6) large-diameter nickel-plated pipe and expansion joints.[9]

In all of these various kinds of metal fabrication, the Dun-

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[8] Appendix A to Affidavit of Otis Brubaker, p. 3, quoting from the exhibit submitted to the Wage Stabilization Board by the American Locomotive Company.

[9] Id., pp. 2-3.

kirk plant is in competition with a number of other manufacturers. It was conceded below, and the District Court's opinion assumes, that the Dunkirk plant cannot be described itself as either an entire industry or as a substantial part of an entire industry.

Among the products manufactured by the Company at Dunkirk, however, are certain specially designed devices essential to the construction of a number of new atomic energy production plants and for replacement purposes at one atomic energy facility. About 50 percent of the Dunkirk plant capacity is employed in the manufacture of these items. The remainder of its facilities is devoted to the fabrication of other equipment for other industries.

The Dunkirk plant is not itself engaged in the atomic energy industry. That industry is defined on page 2 of the affidavit of Marion W. Boyer, General Manager of the Atomic Energy Commission, attached to the complaint herein, as follows:

> "The atomic energy industry is engaged, among other things, in the production of fissionable material, including uranium 235 and plutonium, the manufacture of atomic weapons from such materials, and related research and development activities . . . In addition to producing fissionable materials, the Commission also produces isotopes and atomic weapons."

Dunkirk, therefore, is not a part of the atomic energy industry. Nor, on the other hand, is it itself an entire industry or a substantial part of an entire industry.

The strike at Dunkirk, however, did have an effect on a substantial part of the atomic energy industry in that Dunkirk fabricates components essential to the construction of facilities for the production of atomic energy. It is not the sole potential source of supply for these components. The components are, however, highly specialized items, built on special order. Procurement from other sources would therefore involve a delay of up to seven months in the completion of the atomic energy facilities.[4]

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[4] Specifically, the affidavit of Richard W. Cook, filed in support of the Government's application for a temporary injunction, shows as follows for each category of essential equipment:

The precise state of completion of the construction work at the various atomic energy plants at which the Dunkirk parts will be used is, of course, classified information not available to the petitioners. It may be assumed here, however, that the delay caused by the strike at Dunkirk will at some time have an effect upon the ultimate production of atomic energy.

III. Taft-Hartley Procedures to Settle the Strike

The Labor-Management Relations Act, 1947 (the Taft-Hartley Act) sets forth in Sections 206-210 certain procedures designed to aid settlement of labor disputes creating "National Emergencies". Utilization of those procedures is optional with the President. If he does decide to use them, he must first issue an opinion that the strike affects an entire industry or a substantial part thereof and will imperil the national health or safety. He then may appoint a Board of Inquiry to inquire into the issues involved in the dispute.

These first steps were taken by President Truman on December 3, 1952, when he issued Executive Order 10417 (17 F. R. 10981) containing the statutory expression of opinion. The Board of Inquiry appointed by the President inquired into the issues, as provided for in Section 207 of the Act, and on December 11, 1952, made its written report to the President.

Upon receipt of the report, the President may, if he so desires, proceed further by invoking the injunctive procedures of

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Process piping: A minimum of seven months' lead time would be required to start deliveries from alternative sources of supply. (pp. 3-4)

Heat exchangers: Loss of heat exchangers due to the strike has so far caused an unspecified delay in completing one-fourth of the Savannah River project. Procurement from other sources of supply would entail still greater, but also unspecified, delay (pp. 4-5).

Tube bundles, heat exchanger shells, and tube sheets are now produced by Alco and "certain other companies." (p. 5)

There is one other present supplier of reactor building heat exchangers, and the strike at Dunkirk will cause "delay." (p. 5)

Sub assemblies for gas converters: Procurement from other sources would entail "substantial delays." Movement of the machine tools used to fabricate this equipment to another plant would require 4 to 6 months before full production could be attained. (p. 6)

It is perhaps interesting that the maximum delay specifically alleged is less than the time which has elapsed since the dispute between the Union and the Company began.

Section 208 of the Act to obtain an 80-day period of continued, or resumed, work in which to make further efforts to settle the strike. This second step was invoked by President Truman on December 11, 1952. On that day he directed the Attorney General to petition for an injunction against the continuance of the strike.

In accordance with this direction, the Attorney General on December 12, 1952, filed a complaint in the United States District Court for the Western District of New York. The Company, the Union, and the two locals into which the members of the Union at the Company's Dunkirk plant are organized, were made defendants in the action.

The Government's complaint set forth the existence of the dispute, the actions and determinations of the President and the Board of Inquiry, and certain allegations as to the effect of the continuance of the strike upon the construction of atomic energy facilities and thus upon the national safety. It did not allege any wrongful or illegal act by the Union, its locals, or, for that matter, by the Company. It simply alleged that the strike, if continued, would be injurious to the United States.

The relief requested in the complaint was broad. The Government asked, in Paragraph 1, that the defendants, their officers, agents, etc., and all persons acting in active concert or participation with them, be enjoined from continuing, encouraging, or otherwise taking any part in the strike. Paragraph 2, in addition, asked that all of the members of the Union—more than 1,000,000 in number—be similarly enjoined. Paragraph 3 asked that the Union, and its locals, be ordered to direct its members to terminate the strike. Paragraph 4, finally, asked for an order directing both the Company and the Union "to make every effort to adjust and settle their differences, as contemplated by the National Emergencies provisions of the Labor-Management Relations Act, 1947."

The complaint asked that, "pending the final determination of this cause", a preliminary injunction issue in the terms requested. Pending issuance of the preliminary injunction, it asked for a temporary restraining order.

On December 12, 1952, the District Court issued a tempo-

rary restraining order, without notice or hearing, in the precise terms requested by the Government. The Union and its locals promptly filed motions to dissolve the temporary restraining order and to dismiss the complaint. At the same time, however, they complied with the terms of the *ex parte* restraining order and the men returned to work.

The Government's application for a temporary injunction "pending . . . final determination" and the Union's motions to dissolve and dismiss came on for hearing before the Court on December 18, 1952. Prior to the hearing all of the parties entered into a stipulation that the affidavits submitted by the parties should be accepted as evidence and that the issues presented by the Government's application and the Union's motions should be determined upon the basis of such evidence.

At the hearing, the Union contended (1) that the provisions of Section 208 of the Act were unconstitutional under Article III and the doctrine of separation of powers; (2) that the national emergency provisions of the Act were inapplicable to a strike at a single plant not constituting an entire industry or a substantial part of an entire industry; and (3) that, in any case, the relief requested in Paragraph 2 of the Government's prayer and contained in Paragraph 2 of the temporary restraining order was improper.

The issues were fully briefed and argued by the Union and the Government. The Company appeared at the hearing but took no position on the issues presented to the Court.

On Monday, December 29, 1952, the District Court filed its opinion, issued a temporary injunction in the form requested by the Government, and filed its findings of fact and conclusions of law. The Court rejected the Union's constitutional argument, relying principally on the *Debs* case, 158 U.S. 564, the *Youngstown Sheet & Tube* case, 343 U.S. 579, and the argument, based on a mistaken assumption of fact, that "if there were any merit in the claim . . . in all reason it would likely have been asserted long before this date." With respect to the Union's second contention, the court ruled that the indirect effect of the strike at Dunkirk on another industry was sufficient to bring it within the Act's scope, since otherwise "the Government would be unable to proceed against the Com-

pany and the Union, were it found that the strike did not affect a substantial part of the industry in which the Dunkirk plant was a part."

The District Court did not even pass expressly on the third issue raised by the Union. It simply dismissed the Union's motions and issued an injunction containing a provision restraining action in concert by any of the 1,000,000 members of the Union—irrespective of whether that action was in concert or participation with the named defendants.

The union and its locals filed their notice of appeal on the same day—December 29, 1952. The appeal was docketed in the Court of Appeals for the Second Circuit on the next day, December 30. The petition for certiorari is filed in this Court prior to the hearing or determination of the petitioner's appeal in the Court of Appeals, as permitted by 28 U.S.C. 1254 (1).

REASONS FOR CERTIORARI BEFORE JUDGMENT BY THE COURT OF APPEALS

Hereafter, under "Reasons for Granting the Writ," we seek to show that this case presents important issues of constitutional law and statutory construction which warrant Supreme Court review. If we succeed in that showing it follows, we submit, that the Court should grant certiorari immediately, before decision by the Court of Appeals, for only in that way can these questions ever reach this Court before becoming moot.

Under the provisions of Sections 206-210 of the Taft-Hartley Act the federal District Courts are given jurisdiction to enjoin certain strikes so that certain administrative procedures looking toward settlement of the dispute may be completed during a period of continued, or resumed, work. Under Sections 209 and 210 of the Act, these administrative procedures must be completed within 80 days of the first issuance of an injunctive order in the District Court. At that time—or at an earlier time if the administrative procedures prove successful in settling the dispute—the Attorney General is required to move

for discharge of the injunction and the District Court is required to grant the motion.

It follows from this scheme that the issues presented in this case—and, indeed, the issues in every national emergency injunction case—will necessarily become moot at the end of the 80-day statutory period. This Court's holding in *United States* v. *United Mine Workers of America*, 330 U. S. 258, precludes litigation of the validity of the injunction, or the jurisdiction of the court to issue it, via a subsequent contempt proceeding.

For these reasons, this Court can review the issues of constitutional law and statutory interpretation which we have raised here only by granting certiorari immediately, before decision by the Court of Appeals.

We recognize that we do not have any absolute right to have these issues determined in this Court. We submit, however, that, in the words of Rule 39 of this Court, "the public interest will be promoted by prompt settlement in this court of the questions involved."

The statutory procedures here challenged have been on the books since 1947 and they are today the principal weapon entrusted by Congress to the executive to deal with national emergencies arising from labor disputes. If, as we believe, there is a serious question as to the validity of those procedures, it is of the greatest public interest that this question be resolved by this Court. If, too, there is a serious question as to whether the Act applies only to strikes in an entire industry or a substantial part thereof (as we contend) or has a much broader scope so as to apply to any labor dispute, no matter how small, which indirectly affects another industry (as contended by the Government), then we submit that the prompt resolution of that question by the Court is equally in the public interest.

These two fundamental questions—(1) as to the Act's validity and (2) as to its scope—are presented here in a case relatively free from the atmosphere of public pressure which so often accompanies litigation of this nature. The petitioners have, furthermore, made every effort to expedite the progress of

the case so that the maximum time possible within the 80-day period will remain for this Court to consider the issues on the merits. This case, in short, presents these issues in as favorable an atmosphere for responsible judicial decision as is possible under the provisions of the Act.

Congress did mean the national emergency strike injunctions to be subject to Supreme Court scrutiny. That is clear from the explicit provision in Section 208(c) of the Taft-Hartley Act that these injunctions "shall be subject to review," not only by the courts of appeal but "by the Supreme Court upon writ of certiorari." But such review can never take place in any proceeding under the Act unless this Court grants certiorari before judgment by the court of appeals. Unless the Court determines that the questions which we have raised here, as to the validity and scope of the Act, are not such as to warrant review by this Court in any proceedings under the Act, we submit that it should decide to grant certiorari in this case.

REASONS FOR GRANTING THE WRIT

1. This case presents an important and substantial issue of constitutional law which has not been but should be decided by this Court. That question is whether Sections 206-210 of the Taft-Hartley Act (the 80-day injunction provisions) are unconstitutional as imposing on the federal district courts duties outside "the judicial function of adjudicating justiciable controversies" *(National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 600, Opinion of Jackson, J.).

No constitutional principle was earlier established by this Court or has been more rigorously adhered to than that the Constitution imposes definite limitations on the functions which may be conferred or imposed on the federal courts by the Congress. While the *Tidewater* case disclosed differences of opinion among the justices of this Court as to the source of those limitations, there was general agreement on their scope, which the Chief Justice thus summarized (337 U. S. at 629-630):

"These and other decisions of this Court clearly condi-

> tion the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, *Marbury v. Madison*, 1803, 1 Cranch 137, 2 L. Ed. 60, the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, *Muskrat v. United States*, 1910, 219 U. S. 346, 31 S.Ct. 250, 55 L.Ed. 246; *Gordon v. United States, supra*, the absence of revisory or appellate power in any other branch of Government, *Hayburn's* case, *supra; United States v. Ferreira, supra*, and the absence of administrative or legislative issues or controversies, *Keller v. Potomac Electric Power Co., supra; Postum Cereal Co. v. California Fig Nut Co.*, 1927, 272 U. S. 693, 47 S.Ct. 284, 71 L.Ed. 478."

Examination of the provisions of the Taft-Hartley Act which are involved in this case—Sections 206-210 of the Act—discloses at least a strong probability that they violate these long-established constitutional restrictions.

Section 206 provides that whenever in the opinion of the President a strike affecting an entire industry, or a substantial part thereof, engaged in interstate transportation or in the production of goods for interstate commerce, will, if permitted to continue, imperil the national health or safety, he may appoint a board of inquiry to look into the dispute and to make a written report to him. Upon receiving a report from the board of inquiry, the President may, under Section 208(a), direct the Attorney General to petition "any district court of the United States having jurisdiction of the parties" to enjoin the strike and, if the court finds that the strike "(i) affects an entire industry or a substantial part thereof" engaged in interstate transportation or the production of goods for interstate commerce, "and; (ii) if permitted to occur or to continue, will imperil the national health or safety," the court "shall have jurisdiction" to enjoin the strike.

Section 209(a) declares that following the issuance of an injunction by the district court "it shall be the duty of the parties to the labor dispute giving rise to such order" to make every effort to settle and adjust their differences with the assistance of the Federal Mediation and Conciliation Service.

Section 209(b) provides that upon the issuance of an injunction, the President shall reconvene the board of inquiry; that at the end of 60 days (unless the dispute has been settled by then) the board of inquiry shall report to the President the current position of the parties, including a statement of the employer's last offer of settlement; and that during the next 15 days the National Labor Relations Board shall take a ballot of the employees on whether they wish to accept the employer's last offer, and shall certify the results of the ballot to the Attorney General within five days thereafter. (The total of these three periods set out in Section 209(b) is a maximum of 80 days: i.e., 60 plus 15 plus 5.)

Section 210 provides that upon the certification of the results of the ballot (i.e., after a maximum of 80 days or upon a settlement being reached, whichever happens sooner), "the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged."

Finally, Section 210 also provides that when the injunction is discharged, the President shall submit to the Congress "a full and comprehensive report of the proceedings . . . together with such recommendations as he may see fit to make for consideration and appropriate action."

Thus, the function of a federal district court under these provisions is not to decide a case, but simply to issue an 80-day injunction against a certain type of strike. The strike which is to be enjoined may be entirely legal, or it may be in violation of some substantive provision of federal law, or of some contract between the union and the employer. But the legality or illegality of the strike is not a question which is before the district court or upon which its issuance of an injunction is made to depend: in this case, for example, there is no claim that the strike which was enjoined was illegal under any contractual provision or substantive provision of federal law. The district court is thus authorized by the Act to take certain action—to issue an injunction—which is wholly unconnected with the ultimate adjudication of any substantive legal issue by it or any other court or any administrative body.

When the court issues the injunction, its part in the handling

of the dispute is over, except that it must dissolve the injunction after 80 days. During this 80-day period, the Executive Branch of the Government, through the Conciliation Service, is to attempt to settle the dispute. If it fails, a ballot of the employees on the last offer of the employer is to be taken by the National Labor Relations Board. At that point the Executive Branch of the Government likewise is to drop out of the picture, and the President is to refer the whole problem to Congress for solution.

The district courts are thus asked to play a temporary and intermediate role, not connected with the adjudication of any case or controversy, in the executive and administrative procedures established by Congress to promote the settlement of certain types of labor disputes. The courts are not asked to decide anything, but simply to use their coercive powers as part of an administrative procedure which seeks to settle strikes. The courts are not asked to decide a lawsuit but to participate in attempting to settle a labor dispute.

It is not difficult to understand how the idea of authorizing a district court to issue an injunction, not as part of a lawsuit but as part of settling a strike, arose. For, as unions have long complained, the issuance of a labor injunction, although theoretically incident to the litigation of a lawsuit, is in reality, as far as the employer is concerned, an end in itself. It is a means of settling a labor dispute by breaking a strike. The injunction's theoretical relation to the adjudication of a legal controversy is thus lost sight of—and naturally enough since the lawsuit seldom proceeds beyond the issuance of the injunction. Thus it came about that Congress, in these Taft-Hartley provisions, quite overlooked the need for an underlying lawsuit as a basis for judicial jurisdiction.

The arguments to which the Government has resorted to support the constitutionality of these Taft-Hartley provisions themselves underline the need for review of the issue by this Court.

The principal argument which the Government advances—which was accepted by the court below, as it has been by other district courts in the absence of review by this Court—is that

under the decision of this Court in *In re Debs*, 158 U. S. 564,[1] and quite apart from statute, the Government is entitled to use the courts "to prevent strikes affecting the public welfare." [2] In this view the Taft-Hartley provisions are significant only because they remove the barrier to an injunction otherwise created by the Norris-LaGuardia Act.[3] This assertion that the Taft-Hartley provisions are unnecessary, and simply declaratory of pre-Norris-LaGuardia common law, is apparently regarded by the Government as establishing the constitutionality of the provisions.

In making this argument the Government does not so much as suggest that the issuance of an injunction must rest on a showing that the conduct to be prohibited is unlawful. On the contrary, the Government asserts that it need show only (1) that it has standing to sue and (2) that the court has "jurisdiction" to issue an injunction.

No such doctrine as that asserted by the Government and accepted by the court below has heretofore been known to Anglo-Saxon jurisprudence. The conduct of private citizens may not be restrained by Government fiat or court decree simply on the ground that it will be detrimental to the public interest. The Government and the courts have no general power to prevent conduct deemed injurious to the public welfare, unless that conduct transgresses some law or legal principle. Ours is a Government of laws, not of men.

The *Debs* case does not, of course, stand for any such broad and revolutionary principle as that asserted by the Government and the District Court. The facts in the *Debs* case are well known. The employees of the Pullman Company went out

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[1] Government Brief in the District Court, p. 8:

"The Supreme Court of the United States determined in In re Debs, 158 U. S. 564 (1895), that whenever a labor dispute affects the public at large, in respect to matters which by virtue of the Constitution are entrusted to the care of the Nation, the Government has standing in the courts to complain of such acts (at 158 U. S. 584, 586, 599), and that the federal courts have jurisdiction to enjoin such strikes."

[2] Government Brief in the District Court, p. 12.

[3] Government Brief in the District Court, p. 8:

"The injunction provisions of Section 208 do not confer upon the courts any new or unheard of powers; they merely restore to them in a somewhat limited form jurisdiction of which they have been deprived in 1932, by the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. 101-115)."

on strike, and the American Railway Union declared a boycott against the cars of the Pullman Company. The Union's members, employed by some 22 different railroads, not only themselves refused to haul Pullman cars but, according to the bill of complaint, used force and violence to prevent any movement of Pullman cars or of trains containing Pullman cars. The complaint thus clearly alleged that the conduct sought to be enjoined was unlawful. As the Court said (15 Sup. Ct. 911-912):

> "The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried."

Therefore the only questions to which the Court addressed itself were whether the United States had standing to seek an injunction and whether grounds for equitable relief were shown.

The affirmative answers which this Court gave to these questions are no aid to the Government here. We do not here question that the United States may have an interest which would entitle it to come into court to enjoin the Union from violating the law—*if the Union were violating any law.* Hence, the lengthy quotations from the *Debs* opinion on the standing of the United States to sue, which the Government and the District Court put forward as decisive of the present question, have nothing to do with the case. Nor do we argue, as was argued on the second branch of the *Debs* case, that no ground for equitable relief is shown.

What we assert is that the district court is here performing a function which is not judicial at all. There is no statutory provision or legal principle whose violation the court is preventing. The injunction has nothing to do with any case or controversy which is before the district court or which will ever be before any court, or any administrative body. The district court simply issued an injunction to stop a strike for eighty days while solution of the labor dispute which caused the strike was attempted by other branches of the Government.

The District Court did not find that the strike it enjoined was unlawful or illegal. Its opinion on this point reads in its entirety:

> "The apparent basis for this [i.e. the Union's] position is that the statute creates no legally enforceable rights as between the Union and the Company and that the Act does not make the strike illegal. When the Court is authorized to issue an injunction, there arises a liability to the Union and Company, not a liability for money damages but a liability which may be enjoined. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Gordon* v. *U.S.*, 117 U.S. 697." [4]

This absence of any finding that the strike which was enjoined was illegal is wholly consistent with the statutory scheme. For the statute makes no provision for a determination of legality. It says that if the court makes the two prescribed findings "it shall have jurisdiction to enjoin the strike." The findings thus clearly go to the court's jurisdiction and not in any way to the legality of the action sought to be enjoined.

The fact that a court acting under these Taft-Hartley provisions is confronted at the outset with the necessity for deciding its own jurisdiction likewise does not mean that it is presented with a justiciable case or controversy. Every court of limited jurisdiction, which all federal courts are, is always initially confronted with a question of its jurisdiction, but that does not by itself satisfy the constitutional requirement that there be a justiciable case or controversy; otherwise the requirement would be meaningless.

Finally, the Government and the court below rely on the cases upholding the power of the courts to issue injunctions

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[4] In the *Keller* case this Court held that the function of the courts of the District of Columbia in reviewing and revising rate orders of the public utility commission was not judicial, but legislative and advisory, so that this Court could not constitutionally be given jurisdiction to review these activities of the District of Columbia courts. The *Gordon* case held unconstitutional the provision for Supreme Court review in the original court of claims statute, because the determination of the Court of Claims were subject to revision by the Secretary of the Treasury and Congress. We believe these cases to be quite pertinent to this case, but they hardly support the proposition of the District Court.

under Section 10(1) of the Taft-Hartley Act, such as *Douds v. Retail Store Union*, 170 F. 2nd 695 (CCA 2). The function entrusted to the courts by Section 10(1) of the Act differs entirely in character, however, from that imposed under the national emergency strike provisions.

Section 10(1) provides that whenever a charge is filed with the Labor Board alleging the commission of an unfair labor practice of a certain type, viz. a secondary boycott or jurisdictional strike in violation of Section 8(b)(4)(A),(B) or (C) of the Act, the Board, if after preliminary investigation it has reason to believe that the charge is true and that a complaint should issue, shall petition a district court for appropriate injunctive relief pending adjudication by the Board. "Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it seems just and proper . . ."

Whether or not an injunction is issued by a district court, an unfair labor practice case under 8(b)(4) is thereafter processed just as is any other unfair labor practice case: a complaint is issued, there is a hearing before a trial examiner and ultimately the Board renders a decision and order. The Board's order is subject to review by an appropriate court of appeals and ultimately by the Supreme Court. Thus the case will not come before the district courts for further consideration, but will go to the Board, a Court or Appeals, and, perhaps, the Supreme Court.

The function of a district court under 10(1) is thus to make a preliminary determination of whether the defendant has engaged in conduct made unlawful, i.e., declared to be an unfair labor practice, by substantive provisions of the Act, and, if the court so finds, to issue a preliminary injunction pending further administrative and judicial proceedings. The basis of the challenge to the validity of 10(1) was not, as here, that the district court was not performing a judicial function but "that the ultimate decision as to the merits of the controversy" would not be made by the district court but by the Labor Board, and ultimately by a court of appeals or the Supreme Court. The court of appeals rejected this contention. It held

that a court could grant a preliminary injunction to protect the jurisdiction of an administrative body or of another court just as it could to protect its own jurisdiction. The court said:

> "Here was a dispute to be resolved under the direct provisions of the statute. It did not cease to be a dispute because the ultimate decision on the merits would not rest with the court." (23 LRRM at 2047).

i.e., the court authorized to grant the preliminary injunction.

The distinction between that case and the present is at once apparent: in that case there was an issue—whether an unfair labor practice had been committed—which was to be adjudicated. The district court was authorized to adjudicate that issue preliminarily, and to grant temporary relief pending final adjudication by the Board and the appellate courts.

Here there is no issue which is ever to be adjudicated. The district court has simply granted a temporary injunction, not pending an adjudication but pending executive and congressional attempts to settle a strike.

The injunction which the district court issued is not in aid of the jurisdiction of any other court or of any administrative body. It is a *sui generis* device—a temporary decree by which the court has stopped a strike, not permanently, but for 80 days. The court did this without any determination of whether the strike was legal or illegal, and no such determination is ever to be made by anybody.

We respectfully urge that whether the issuance of such an order is a judicial function is an important and substantial constitutional question which should be decided by this Court.

2. It has heretofore been universally assumed, both in Congress and elsewhere, that the "National Emergencies" procedures of the Taft-Hartley Act could be used only with respect to industry-wide strikes or those which were substantially industry-wide. This is the first case in which it has been held that the Act has a far wider scope, extending to any dispute, no matter how small, which has an indirect effect upon an entire industry, or a substantial part thereof, because the strike interferes with the production of supplies for that industry. Such a construction of that Act, if correct, will enor-

mously expand its coverage. Virtually any strike in a single plant of a capital goods industry has some effect on the industry which it supplies with equipment or materials.

Until this time, so far as we know, it has never been contended in Congress, or elsewhere, that such secondary effects brought a strike within the purview of the "National Emergencies" provisions. If the holding of the District Court, upholding the Government's contentions, is correct, the Act has acquired a meaning never before ascribed to it by the Government and never, we submit, contemplated by Congress.

Section 208(a) of the Act provides that, upon petition of the Attorney General, a district court "shall have jurisdiction" to enjoin a strike if the court finds that it:

> "(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
>
> "(ii) if permitted to occur or to continue, will imperil the national health or safety . . ."

Thus, two separate findings are made prerequisite to the court's jurisdiction, first that the strike "affects an entire industry or a substantial part thereof" and second that the strike, if permitted to occur or continue, will imperil the national health or safety. Neither finding is sufficient standing alone: Specifically, the court has no power to grant an injunction simply upon the basis of the second finding, viz., that the strike imperils the national health or safety. Yet, in this case, the District Court apparently held that if the second requirement was met, the first was irrelevant.

The District Court first conceded that, if the Act applied only to strikes within an industry, then the strike at Dunkirk "would not affect an entire industry or a substantial part thereof." But, it concluded, this construction could not be accepted, for "it would prevent action in many strikes affecting the national health and safety."

This amounts to a holding that the first requirement—that the strike affect substantially an entire industry—must be con-

strued so as to be meaningless if the second requirement—as to the national health or safety—is met. For, if both requirements are to be given substance, then it necessarily must follow that some strikes meeting only the second requirement, i.e., "affecting the national health and safety," will not be enjoinable.

There seems to be no possible warrant for the District Court's virtual excision of part of the statute. Argumentatively more valid, at least, would have been a holding based on the use of the word "affects" in the statute. It can be argued that the first requirement of the Act is satisfied where a strike in a plant in one industry has an indirect effect on another simply because the Act used the word "affects." This latter argument would assume that Congress, in requiring that the strike be one that "affects" an entire industry, meant only to say that it must be one which "has an effect" upon an entire industry.

Such a reading can be argued to be permissible as a matter of language. "Affect" is first defined by Webster to mean "to lay hold of or attack (as a disease does)" and, secondly, to mean "to act or produce an effect upon." The first meaning quoted would seem to require that the strike directly involve the specified industry; the second would permit the showing that a strike in a small part of another industry produced some influence or effect upon the specified industry. But the legislative history of the Act itself, post-legislative Congressional comment, and the manner in which the Government itself has employed the Act make it clear, we think, that only the first meaning was intended.

a. *The legislative history.* Both in the Senate and in the House the sponsors of the legislation and its opponents all recognized and repeatedly stated that, in the words of Senator Taft, its Senate sponsor, the emergency provisions only applied "where a strike occurs in a Nation-wide industry." 93 Cong. Rec. 4262, 2 Leg. Hist. 1133.*

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* For the convenience of the Court, citations herein to the legislative history of the Taft-Hartley Act will include not only the Congressional Record, or other appropriate citation, but also to the *Legislative History of the Labor-Management Relations Act, 1947*, published by the Government Printing Office in 1948. This work will, for convenience, be cited as "Leg. Hist."

This description of the Act's scope was not a chance one. Similar references are contained in the Majority Report of the Senate Labor Committee,[10] as well as in other statements by Senator Taft,[11] Senator Pepper,[12] Senator Murray,[13] Senator Smith,[14] and Senator Ball.[15]

Senator Ball's statement was even more explicit than Senator Taft's. In a speech which he had printed in the Record, he said:

> "This is the only provision in the Senate bill dealing with industry-wide bargaining and strikes, which all agree is one of our major problems. The Senate rejected an amendment to give local unions autonomy and stop internationals from dictating the terms of collective bargaining agreements on the grounds further study was needed. As it is, the 80-day mediation period applies only to industry-wide strikes and unions can avoid its application completely by bargaining on a local or community basis." 93 Cong. Rec. A2252, 2 Leg. Hist. 1523.

Bargaining on a local basis is precisely what the Union has done here.

The history in the House was equally explicit. The House bill, sponsored by Representative Hartley, proposed to deal with the problem of national emergency strikes by striking at what the measure's proponents called the cause of such strikes —industry-wide bargaining. It provided, with certain exceptions, that no union could be certified by the Board as bargaining agent for the employees of two or more competing employers," thus, as the committee report stated, dealing with "one of our country's greatest and most pressing problems, industry-wide bargaining and industry-wide strikes." [17] This provision passed the House but did not commend itself to the

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[10] S. Rep. No. 105, 80th Cong., 1st Sess. 14-5, 29 (1947), 1 Leg. Hist. 420-1, 435.
[11] 93 Cong. Rec. 4262, A3043, 2 Leg. Hist. 1133, 1626.
[12] 93 Cong. Rec. 6520, 2 Leg. Hist. 1598.
[13] 93 Cong. Rec. 4033, 2 Leg. Hist. 1044.
[14] 93 Cong. Rec. 4281, 2 Leg. Hist. 1145.
[15] 93 Cong. Rec. 5012, A2252, 2 Leg. Hist. 1493, 1523.
[16] H. R. 3020, 80th Cong., 1st Sess., § 9(f)(1) (1947), 1 Leg. Hist. 187-8.
[17] H. R. Rep. No. 245, 80th Cong., 1st Sess. 8-9 (1947), 1 Leg. Hist. 299-300.

Senate. As Senator Ball said in the Senate, the Senate bill dealt only "with the effect—the industry-wide strike—and not with the cause," [18] as he believed the House bill had done.

In conference, the Senate provision was in substance adopted and the House provision deleted. Both Congressman Hartley,[19] in support of the bill reported out of conference, and Congressman Lesinski [20] in opposition, recognized on the floor of the House that the Senate provisions were meant to deal with "a strike in a Nation-wide industry." [21]

The Congressional conception of the meaning of Sections 206-210 is further underlined by the fact that Congress explicitly rejected proposed provisions which would reach strikes not directly involving entire industries or substantial portions thereof. The House bill did contain a provision, which was finally deleted in conference, dealing with public utility strikes.[22] Proposals to cover other local stoppages, such as the present one is alleged to be, "endangering the public health or safety" were introduced by Congressmen Case,[23] Auchincloss,[24] Hale,[25] Heselton,[26] and Herter.[27] These proposals were rejected. In the Senate, too, proposals were made, but not adopted, which would encompass strikes not directly involving an entire industry or a substantial portion thereof.[28]

The District Court dismissed this legislative history with the simple explanation that "those statements were made at a time when the nation was engrossed in a nation-wide strike." That Congress was thinking about a nation-wide strike when it passed the Act is, of course, correct. But it does not follow that the legislation Congress passed to deal with that problem

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[18] 93 Cong. Rec. 5012, 2 Leg. Hist. 1493.
[19] 93 Cong. Rec. 6383, 1 Leg. Hist. 882.
[20] 93 Cong. Rec. 7345, 1 Leg. Hist. 910.
[21] 93 Cong. Rec. 6383, 1 Leg. Hist. 882.
[22] H. R. 3020, 80th Cong., 1st Sess., §§ 203-206 (1947), 1 Leg. Hist. 214-9.
[23] H. R. 34, 80th Cong., 1st Sess. (1947). See extension of remarks of Congressman Case, 93 Cong. Rec. A1007-8, 1 Leg. Hist. 577-8.
[24] H. R. 17, 80th Cong., 1st Sess. (1947). See footnote 23.
[25] H. R. 68, 80th Cong., 1st Sess. (1947). See footnote 23.
[26] H. R. 75, 80th Cong., 1st Sess. (1947). See footnote 23.
[27] H. R. 76, 80th Cong., 1st Sess. (1947). See footnote 23.
[28] See item 12 in extension of remarks of Senator Wiley, 93 Cong. Rec. A1035, 2 Leg. Hist. 993; § 104 of substitute bill of Senator Murray and others, 93 Cong. Rec. 4898, 2 Leg. Hist. 1441.

should therefore be applied to other kinds of strikes. Particularly is this so when the post-legislative history shows clearly that both the Congress and the executive branch of the Government adhered to their original conception of the Act's scope even when "engrossed" in the problem created by strikes in single plants producing items necessary for the national health or safety.

b. *Post-Legislative History:* The emergency provisions of the Act have been utilized by the Government at least nine times since 1947.[*] In each one of those cases, the industry alleged to be affected by the strike, or threatened strike, was the industry in which the strike occurred. In not one was a strike in one industry sought to be enjoined because of its effect upon a different industry. This is the first case in which any such broad scope for the Act has been claimed.

The assumption that the Taft-Hartley Act did not reach strikes having only an indirect effect on an entire industry constituted, indeed, a large part of the basis upon which it was argued that it was appropriate for the President to confer powers upon the Wage Stabilization Board to deal with any dispute "which substantially threatens the progress of national defense."

It was urged by some that the dispute powers of the Board were unnecessary in view of the availability of the emergency procedures of the Taft-Hartley Act. It was quickly pointed out, however, that, although the two overlapped, the Taft-Hartley Act did not cover disputes which, although they substantially threatened the national defense, did not directly involve an entire industry.[*] In response to testimony to this effect in 1951 before a subcommittee of the Senate Committee on Labor and Public Welfare by the then chairman of the Wage Stabilization Board, Senator Taft himself stated:

"Now I do not say the Taft-Hartley law is inadequate

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[*] "National Emergency" Disputes under the Labor Management Relations (Taft-Hartley) Act, 1947-June 30, 1952, Bureau of Labor Statistics Bull. No. 2, Series 5 (1952).

[*] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare on Wage Stabilization and Disputes Program, 82nd Cong., 1st Sess. 14, 19 (1951).

> . . . That only attempts to cover a Nation-wide strike anyway. It does not attempt to cover the kind of thing most of which you will be dealing with." [41]

Similar testimony before the same sub-committee in 1952 by the new chairman of the Wage Stabilization Board, Nathan Feinsinger,[42] brought forth no contradiction.

Finally, in 1952, the Senate Committee on Labor and Public Welfare reported out a bill, S. 2999,[43] to amend the national emergency provisions of the Taft-Hartley Act by adding new provisions dealing with strikes "in a vital industry or plant" which would endanger the national security. In its report the Committee analyzed the proposed new provisions and the need for them, in part as follows:

> "Section 206 of the present Taft-Hartley Act applies to strikes and lock-outs 'affecting an entire industry or a substantial part thereof' so as to 'imperil the national health and safety.' This new section would permit application of the new procedures to a unit smaller than a 'substantial part' of an industry. This would meet the potential need of insuring production *in one or a few plants producing critical items.*" [44] (Emphasis added.)

Congress has since withdrawn all dispute jurisdiction from the Wage Stabilization Board. It refused to consider S. 2999. To fill the gap the Government has here attempted to stretch the Taft-Hartley Act to cover precisely the kind of case which, up until now, has been regarded as outside of its scope.

The District Court ruling upholding that construction of the Act should, we submit, be reviewed here and reversed. It constitutes a decision on a vital issue of federal law which has not been but should be settled by this Court. The importance of obtaining a decision here as to the scope of the emergency provisions of the Act is further magnified by the ephemeral nature of the Act's judicial proceedings, which makes it ex-

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[41] *Id.* at 19.

[42] Hearing before the Subommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare on the Wage Stabilization Board, 82nd Cong., 2nd Sess. 4-5 (1952).

[43] S. Rep. No. 2073, 82nd Cong., 2nd Sess. (1952).

[44] *Id.* at 20.

tremely difficult to obtain appellate review. The District Court ruling as to the scope of the Act, unless reviewed here, is almost certain, for that reason, to remain as a definitive guidepost for the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari to review the orders of the District Court, prior to judgment on the appeal therefrom to the Court of Appeals, should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
Civil No. 5524
UNITED STATES OF AMERICA, *Plaintiff*
against
AMERICAN LOCOMOTIVE COMPANY, INC., UNITED STEELWORKERS OF AMERICA, CIO, LOCAL 2286, UNITED STEELWORKERS OF AMERICA, CIO, LOCAL 4498, UNITED STEELWORKERS OF AMERICA, CIO.
Defendants.

APPEARANCES:

HON. JAMES P. McGRANERY, Attorney General of the United States; HON. GEORGE L. GROBE, United States Attorney; HOLMES BALDRIDGE, Assistant Attorney General; EDWARD H. HICKEY, Special Assistant to the Attorney General; JOHN G. ROBERTS, Attorney, Department of Justice; HERMAN MARCUSE, Attorney, Department of Justice, and HENRY W. KILLEEN, JR., Assistant United States Attorney, of Counsel, for the Plaintiff.

PETER J. CROTTY, Esq., Attorney; ARTHUR J. GOLDBERG, Esq., General Counsel for CIO and General Counsel for United Steelworkers of America, CIO, and DAVID E. FELLER, Esq., Assistant General Counsel for CIO, of Counsel, for the Defendant Union.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, by HOMER H. WOODS, Esq.; W. J. BOLTE, Esq.; JOHN E. DICKINSON, Esq., and JOHN JACKSON, Esq., of Counsel, for the American Locomotive Company.

KNIGHT, Chief Judge:

There comes up for consideration by this Court a motion, by the plaintiff, for a preliminary injunction enjoining "the defendants, and each of them, and their officers, agents, servants and employees, and all persons in active concert or participation with them, or any of them, (a) from in any manner continuing, encouraging, ordering, aiding, engaging or taking any part in strikes or lockouts in the plant of the American Locomotive Co. (hereinafter called ALCO) at Dunkirk, New York; (b) from in any manner interfering with or affecting the orderly continuation of work in the said plant, and from taking any action which would interfere with this Court's jurisdiction in the premises."

On December 12, 1952, this Court, on application of the plaintiff, granted a temporary restraining order enjoining defend-

ants and individuals from doing or engaging in any of the aforesaid acts. The temporary restraining order provided for its expiration at 2:35 o'clock P. M. on December 22, 1952, lest before that time the said order, for good cause shown, is extended or lest the defendants consent that it may be extended for a longer period. It is in pursuance of the provisions of the temporary restraining order that this application on the 18th day of December, 1952, was made for a preliminary injunction.

There is also here under consideration a motion made by the defendants for an order to dissolve the restraining order herein on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action, in that said complaint constitute a cause of action, in that said complaint does not comply with the provisions of Sec. 208 of the Labor Management Relations Act, 1947. Also, for the further reason that this Court has no jurisdiction over the subject matter and for such other and further relief as may be proper.

Several voluminous affidavits have been submitted on behalf of the plaintiff and defendants. It has been stipulated that certain individuals making such affidavits, if called as witnesses, would testify as stated in their respective affidavits and it is further stipulated that, subject to the approval of the Court, the issues presented by the application of the United States for a preliminary injunction, together with the motions, filed by the United Steelworkers of America, CIO, to dissolve the temporary restraining order and to dismiss the complaint may be determined upon the within stipulated evidence, the oral argument of counsel and written memoranda or briefs submitted or to be submitted by counsel for the parties.

The application of the Government for a temporary injunction is made under the provisions of Sec. 208 of the Labor Management Relations Act of 1947 (The Taft-Hartley Act), 61 Stat. 115, 29 U.S.C. (Supp. 5-b) 178.

The relevant parts of Sec. 208 are as follows:

> "Section 208 (29 U.S.C. (Supp. V) 178). Strikes subject to injunction; in applicability of sections 101-115 of this title; review.
>
> (a) Upon receiving a report from a board of inquiry the

President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lockout—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of sections 101-115 of this title, shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in section 1254 of Title 28."

The Dunkirk plant has approximately 1500 employees of whom 950 were working on products for the Atomic Energy Program at the time of a strike of the United Steelworkers of America, CIO. About fifty percent of the plant's output consisted of products for the Atomic Energy Program. The contract between ALCO and the Union covering this plant expired on January 31, 1951. Thereafter negotiations were engaged in to reach an agreement on the terms of a new contract, which continued to the time of the granting of the order on December 12th.

The work stoppage concerned, among other things, wages, paid vacations and the union shop. While the defendant ALCO has other plants than that at Dunkirk, we are concerned only with the work stoppage at that plant. ALCO was under contract with the Atomic Energy Commission, and certain of its prime contractors, to furnish certain specialized materials, including among others processed piping, heat exchanger shells and heat exchangers and gas converter sub-assemblies, vitally needed for the completion of the constructions of major facilities for the production of fissionable materials. It is apparent that these facilities constitute a substantial part of the Atomic Energy industry and that delay in the construction of these

materials, caused by the Dunkirk strike, will mean a loss in the production of atomic weapons. Large dimension pipes are needed in the construction of three plants which, when completed, will produce uranium-235. As a result of the strike, work has been stopped on twenty-four heat exchanger shells to be used in the Savannah work program of the Commission. These shells are needed in the production of heavy water, which in turn is required for the operation of nuclear reactors capable of producing fissionable materials. The strike has also stopped the production of gas converter assemblies which are needed for installation at the Commission's plants for the production of fissionable materials and any attempt to obtain these sub-assemblies from other sources would cause substantial delay.

It is made to appear from the affidavits that the present facilities for the production of fissionable materials are inadequate to meet atomic weapon wants which the President, on recommendations of the Joint Chiefs of Staff and the National Security Council, has determined to be required for national defense. It becomes imperative to construct the plants, the construction of which is delayed by the strike. It also appears from the affidavits that the estimated cost of the plants affected by the strike exceed $1,800,000,000 and that the total cost of all the existing facilities of a comparable kind is $1,450,000,000.

At the expiration of the contract between the Company and the Union in 1951, negotiations were entered into for a new contract. These were unsuccessful and a strike was threatened. On December 29, 1951, the President of the United States, by virtue of Executive Order 10233, certified the dispute to the Wage Stabilization Board. This latter Board set up a panel to hear the dispute but the Company objected to this dispute at Dunkirk being processed as part of a principal steel and ore case. The Company and the Union agreed to defer presentation to the Wage Stabilization Board until after the steel case was disposed of, when the parties asked the Wage Stabilization Board to proceed with the Dunkirk case. Hearings were had and testimony taken but the amendment to the Defense Production Act of June, 1952, took away the jurisdiction of the Wage Stabilization Board to make recommenda-

tions in a dispute case. Negotiations, however, continued between the two parties, and the Company offered 12½ cents per hour increase in pay. This was rejected by the Union and this strike began August 29, 1952.

Before the institution of this action the President of the United States, on December 3, 1952, acting under the provisions of Sec. 206 of the Act (29 U.S.C. 176), issued Executive Order 10417, 17 F.R., 10981, creating a Board of Inquiry to inquire into the issues involved in the dispute and to submit its report to the President, all in accordance with the provisions of Sec. 206, Labor Management Relations Act, 1947, 61 Stat. 155.

Section 206 provides:

> "Section 206 (29 U.S.C. (Supp. V) 176). National emergencies; appointment of board of inquiry by President; report; contents; filing with Service.
>
> Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public."

Thereafter, on December 11, 1952, the President directed a communication to the Attorney General of the United States in which he in part said, "In my opinion this unresolved labor dispute has resulted in a strike affecting an entire industry, or a substantial part thereof engaged in trade and commerce among the several States and with foreign nations and in the production of goods for commerce, which strike, if permitted to continue, will imperil the national safety." He directed the Attorney General to petition any District Court of the United

States, having jurisdiction of the parties, to enjoin the continuation of such strikes. Thereafter, on December 12, 1952, pursuant to the direction, the Attorney General, appearing by the Assistant Attorney General, the United States Attorney for the Western District of New York, the Special Assistant to the Attorney General, and two attorneys of the Atomic Energy Commission, petitioned this Court to enjoin the strike, or the continuing thereof, on the ground that it affects an entire industry, or a substantial part thereof, and, if permitted to continue, will imperil the national safety.

The Board of Inquiry report, the finding of the President of the United States and the affidavits submitted herein, definitely and clearly show that, "The strike affects interstate commerce, and, if permitted to continue, will imperil national safety." It further appears that the procedure provided by the Taft-Hartley Act, has been strictly followed.

Our first concern is with the question of the constitutionality of the Taft-Hartley Act. It is the contention of the defendant Union that the injunctive provisions of the Taft-Hartley Act are unconstitutional because they confer on the court duties which are not judicial and are not connected with any case or controversy.

The basic problem transcends the ordinary employer-employee dispute wherein private, personal and individual rights are solely involved. The United States of America, plaintiff herein, represents some 140,000,000 Americans whose welfare under the self-same Constitution cannot be ignored.

While technically not at war, existing conditions in Korea are tantamount to war. The Board of Inquiry correctly found that the labor dispute in this plant is immediately and seriously delaying the production of equipment and of fissionable material essential to the making of atomic weapons for the national defense. The strike affects an entire industry or substantial part thereof.

Abuses grew out of the effort to control labor strife during World War II through seizure and by the use of the machinery of the War Labor Disputes Act of 1943 because sufficient safeguards were not thrown around the procedure. But the Taft-Hartley Act definitely has attempted to avoid these abuses

through the Board of Inquiry; the action of the President and the Attorney General followed by a court hearing; opportunity for adjustment efforts after an injunction has been granted; reconvening of the Board of Inquiry; report to the President and a secret ballot of each employee. Seemingly a complete safeguard is thrown around the rights of the parties.

The Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, et seq., specifically withdrew jurisdiction of the courts in labor disputes. The courts had such jurisdiction prior to that enactment. It is to be borne in mind that strikes subject to injunction are limited to those which imperil the national health and safety.

It is the Union's contention that the proceedings under the Taft-Hartley Act are not "judicial" and do not come within the authority of Article III, Secs. 1 and 2, of the United States Constitution.

While in some eight different cases the Act has been under consideration, so far as I am advised, *U. S.* v. *International L. & W. Union,* 78 Supp. 710, and *United States* v. *International Union,* 89 Supp. 187, are the only ones in which the Court has passed directly on the constitutionality of the Act. In both of these cases it was definitely held that the Act was constitutional. See also *United States Commerce Commission* v. *Brimson,* 154 U.S. 447; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693; *Hecht Co.* v. *Bowles,* 321 U.S. 321, 331; *International Union* v. *U.S.,* 77 F. Supp. 563, Aff. 177 F. 2d 29, cert. denied 338 U.S. 871; *Douds* v. *Local 1250, R.W.D.S. Union,* 170 F. 2d 295; *Evans* v. *International Typographical Union,* 76 F. Supp. 881; *United States* v. *Carbide & Carbon Chemicals Corp.* (E.D. Tenn., N. Div. Civil No. 1093, 1948).

In the well known Debbs case, 158 U.S. 564, 584, in which it appears no such statute as the Taft-Hartley Act existed, an injunction was granted the United States against the strike of the Pullman Company. The similarity of the questions involved in both that and the instant case is readily noted and the language of that opinion is strikingly applicable here. Say the Court, in part:

> "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and dis-

> charged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court. . . . whenever the wrongs complained of are such as affect the public at large, and are in respect to matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all of the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those Constitutional duties. . . . Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation."

This case arose before the Norris-LaGuardia Act was passed.

In *United States* v. *International L. & W. Union, supra,* the proceedings were taken under Sec. 206, et seq., of the Labor Management Relations Act (Taft-Hartley Act), and among other things the Court said:

> "Certain of the defendants contend that the provisons of the Act under discussion offend the First, Fifth and Thirteenth Amendments to the Constitution. The arguments on this phase, in the light of the factual setting, are not convincing. Congress designed the section under attack to cope with 'national emergencies.' If the strike threat is carried out, such an emergency will inevitably follow, and there is a clear and imminent danger to the national health and safety." (Citing *United States* v. *United Mine Workers,* 330 U.S. 258 and other cases.)

In *U.S.* v. *International Union, supra,* it was said:

> "As to the constitutionality of Section 208, this provision comes well within the opinion expressed by the late Mr. Justice Brandeis, where he recognized the right of the legislature, as distinguished from the courts, to limit the area of industrial strife, in the following language, 'All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the com-

> munity. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggressions and defense, may substitute processes of justice for the more primitive method of trial by combat'."

In *United States* v. *International Union, U. M. W. of A., supra,* the validity and constitutionality of the Taft-Hartley Act is recognized because the proceeding was to punish for contempt the failure of the defendant to observe the order of the Court. Further in its Conclusions of Law, the District Court there said, "The statutory provisions of Sections 206 to 208 of the Act, and all requirements therein contained, were duly and legally carried out both prior to and in the institution of this action by the United States of America." (P. 572). The defendant, as in the preceding case, claimed that the First, Fifth and Thirteenth Amendments of the Constitution were violated. Further the Court there found, as a conclusion of law, that it had jurisdiction of the subject matter.

In *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, in the prevailing opinion we find this language:

> "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here, nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied."

Frequent reference is made to the lack of statutory authority. This would seem to imply that if statutory authority had been given this seizure would have been held to be legal. Justice Frankfurter in a concurring opinion in that case (p. 597-599) said:

> "The question before the Court comes in this setting. Congress has frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limita-

> tions and safeguards. This body of enactments . . . demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. . . . Seizure statutes usually make executive action dependent on detail conditions; . . . No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress."

In a footnote Justice Frankfurter fortifies his statement by quoting from Senate Report 105, 80th Congress, 1st Sess. 15, as follows:

> "In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis."

In his opinion in *Youngstown Co.* v. *Sawyer*, p. 668, Vincon, C.J., used very significant and appropriate language:

> "Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict. . . . Congress, recognizing the 'grim fact . . . that the United States is now engaged in a struggle for survival' and that 'it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour,' granted authority to draft men into the armed forces."

It is to be noted that in several of the reported cases brought under the Taft-Hartley Act, it is claimed the Act is in violation of the First, Fifth and Thirteenth Amendments of the Constitution, while in the instant case it is charged that the Act violates Art. III, Secs. 1 and 2. Whether the limitations in these two sections are treated as two different restrictions or as a single restriction is of no moment here. One states where the

judicial power shall be based and the other specifies the extent of the judicial power.

The Union has quoted at length from *Marbury* v. *Madison*, 1 Cranch 137; *McCulloch* v. *State of Maryland*, 4 Wheat. 316; the Tidewater case, 337 U.S. 582 and *Youngstown Co. v. Sawyer, supra.* These cases define in differing language "judicial power," as the meaning intended by the Constitution.

The Union lays much stress on the Tidewater case, which involved no question comparable here. The Union, however, seeks to cull out certain statements in that case. A general discussion is found in the opinion of the authority of Congress to legislate because of the provisions of Article III of the Constitution. It is not believed that the Tidewater case is conclusive of the issue here.

It is believed that this is a "controversy" within the meaning of that word in the Constitution and that as such it is appropriate for judicial determination. A controversy is definite and concrete and touches on the legal relations of the parties having a legal interest. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227.

Article III, Sec. 2, of the United States Constitution reads:

> "The judicial power shall extend to all cases, in law and equity, existing under this Constitution. . . . Controversies to which the United States shall be a party."

None of the cases cited by the Union are concerned with Sections 206 and 208 of the Taft-Hartley Act, which has been on the statutes nearly five years. If there were any merit in the claim that it is unconstitutional because it provides for judicial determination of matters which do not constitute a justiciable "case" or "controversy," in all reason it would likely have been asserted long before this date and especially in view of the well known opposition to the Act. The claim of unconstitutionality as violative of the First, Fifth and Thirteenth Amendments to the Constitution has heretofore been made, but nothing seems to have been said about Article III.

The Union urges that the Taft-Hartley Act purports to vest the court with jurisdiction over "administrative" matters and thus exceeded the restriction that the court is limited to cases and controversies. The apparent basis for this position is that

the statute creates no legally enforceable rights as between the Union and the Company and that the Act does not make the strike illegal. When the Court is authorized to issue an injunction, there arises a liability to the Union and Company, not a liability for money damages but a liability which may be enjoined. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Gordon* v. *U.S.*, 117 U.S. 697. The related contention that the parallel injunction provisions of Sec. 101 (j) of the Taft-Hartley Act, authorizing the National Labor Relations Board to obtain injunctions against unfair labor practices constitute an unconstitutional delegation of administrative duties to the courts has been rejected in numerous cases. *Douds* v. *Local 1250, Retail Wholesale Department Store Union*, 2 Cir., 170 F. 2d 695; *Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. 2d 333, certiorari dismissed 336 U.S. 949; *Federal Trade Commission* v. *Thomsen-King Co.*, 109 F. 2d 516. The court proceedings are independent of the administrative procedure.

The Court must find the facts and it is not bound by the findings of the Review Board. The conditions for issuing the injunction are that the strike must affect an entire industry or a substantial part thereof; that the industry must be engaged in commerce or the production of goods for commerce, and that the national health or safety must be endangered.

The Union asserts that the emergency injunction provisions apply only to strikes within the industry, i.e. the Dunkirk plant. If that were true the strike would not affect an entire industry or a substantial part thereof. Were that construction to be followed the efficacy of the Act would practically be destroyed. Here then the Government would be unable to proceed against the Company and the Union, were it found that the strike did not affect a substantial part of the industry in which the Dunkirk plant was a part. To support the Union's contention, the Union quotes at considerable length from statements made in Congress when the Taft-Hartley bill was under consideration. These quotations seem wholly confined to the matter of industry wide strikes and while nothing seems to have been said about the phrase "or substantial part thereof," this does not mean that Congress was unmindful of this limi-

tation. Section 208 (a) says, "an entire industry or a substantial part thereof." This language is so plain that anyone who runs may read and understand. The industry in question is the Atomic Energy Commission. The strike in effect is a strike against the Government. Repeated references were there made to "nation-wide strikes." Those statements were made at a time when the nation was engrossed in a nation-wide strike. *Youngstown Co.* v. *Sawyer, supra.* A construction that the Act is applicable only to nation-wide strikes would be erroneous for it would prevent action in many strikes affecting the national health and safety.

The struck plant and the Atomic Energy Industry are engaged in commerce or production of goods for commerce. The proofs show that ALCO ships its products in interstate commerce and the materials furnished for the Atomic Energy Commission are, when processed, delivered to foreign states and countries. Section 101 (6) of the Taft-Hartley Act defines commerce as "trade, traffic, commerce, transportation or communication among several States or between any foreign country and any State. . . ." The atomic energy industry is owned by the Atomic Energy Commission, an agency of the Government, and it stands in the same relation as concerns trade between the States or between any foreign country and a State. *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497; *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232.

The fact that the issuance of the injunction is in the Court's "discretion" is of no moment here. The questions are—is the Act constitutional and does the Court have jurisdiction? Of course, if the Act is unconstitutional there can be no question that there is no jurisdiction. Whether mandatory or discretionary the Court is not deprived of its equitable power. *Hecht Co.* v. *Bowles, supra.*

Section 1 of the Act states the purpose and policy of the Act in question. It reads in part:

> ". . .
>
> (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legit-

imate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. 61 Stat. 136, 29 U.S.C. (Supp. V) 141."

In *United States* v. *Morgan*, 307 U.S. 183, the Court said:

"It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid and the manner of moulding its remedies, may be affected by the public interest involved."

During the Senate discussion of the Taft-Hartley Act it was said:

"Recognizing that the right to secure injunctive relief is subject to abuses, this bill is carefully drawn to guard against excessive resort to courts. It provides that the Attorney General shall not petition a federal court for such relief until he has convened a special board of inquiry to advise him in the matter." S.R. 105, 80th Cong., 1st Sess. p. 15.

It does not appear that plaintiff has any other adequate remedy than is sought in this suit.

No one can foretell the effect upon the Government and the people if this strike is continued. This is far from an ordinary controversy. It seems unthinkable that a strike in a plant producing for the Government items now vitally necessary to the defense of this country and the security of its people, should be permitted to continue.

After giving this matter careful and anxious attention, it is determined that:

(1) Sections 206 and 208 of the Labor Management Relations Act, 1947, are valid and constitutional;

(2) the Court has jurisdiction of the parties and of the subject matter of the suit;

(3) the motions of the defendant Union to dismiss the complaint and to dissolve or modify the temporary restraining order in this proceeding are denied; and

(4) the motion of the Government for a preliminary injunction is granted.

Findings may be submitted.

JOHN KNIGHT,
Chief Judge.

Dated: December 29, 1952.

HAROLD B. WILLEY, Clerk

NO. 523

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

UNITED STEEL WORKERS OF AMERICA, CIO; LOCAL 2286, UNITED STEEL WORKERS OF AMERICA, CIO; LOCAL 4498, UNITED STEEL WORKERS OF AMERICA, CIO,

Petitioners

v.

UNITED STATES AND AMERICAN LOCOMOTIVE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES AND AMERICAN LOCOMOTIVE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought by the United States, under Section 208 of the Labor Management Relations Act, 1947 (the Taft-Hartley Act), 61 Stat. 155, 29 U.S.C. (Supp. V) 178, to enjoin the continuation of a strike by petitioners at the Dunkirk, New York, plant of the respondent American Locomotive Company. The strike had brought to a halt the production, under contract with the Atomic Energy Commission and certain of its prime contractors, of certain unique materials essential to the construction of three plants now being built under a huge Congressionally authorized program for the expansion of Atomic Energy Commission facilities. The extent of the production facilities affected is indicated by the fact that their cost exceeds that of the presently existing facilities of the entire atomic energy industry. The Dunkirk plant is the only available existing source of supply of certain of these materials, and no substitute source of supply for any of the listed materials can be obtained without substantial delay.

As indicated by petitioners, a work stoppage had been in effect at the Dunkirk plant for some time. The Government sought as long as possible to give free play to the operation of collective bargaining processes. A point was reached, however, at which irreparable injury to the national safety was threatened. The work stoppage reached the critical point, no longer to be avoided by drawing on inventory or resorting to makeshift operations, at which delay in production at Dunkirk had direct impact on the vital atomic energy expansion and construction program.[1/] Drastic curtailment of construction was imminent. That this might be averted, the national emergency provisions of the Labor Management Relations Act were invoked.

On December 3, 1952, the President, "being of the opinion that the instant labor dispute [had] resulted in a strike affecting a substantial part of an industry engaged in trade or commerce among the several States or with foreign nations, or in the production of goods for commerce, which strike, if permitted to continue, [would] imperil the national safety," appointed a Board of Inquiry in accordance with the provisions of the statute. The Board made its written report to the President on December 11, 1952. Subsequently, the Attorney General, pursuant to Presidential directive, instituted this suit on behalf of the United States.

A preliminary restraining order was issued on December 12, 1952. Thereafter, on December 29, 1952, after hearing based on stipulated facts, the district court granted a preliminary injunction. The district court made specific findings which affirmed the critical nature of the situation which the work stoppage at Dunkirk had precipitated and the irreparable injury threatened to national defense if the interruption

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1/ Delay in this construction and expansion program would result in failure to produce atomic weapons in accordance with the goals fixed by the President on recommendation of the Joint Chiefs of Staff. We need not labor the effect on our national safety or international position of any such failure in the atomic energy field.

to production were permitted to continue. The district judge found that the cessation of work at Dunkirk was terminated only because of the proceedings brought by the United States under the Labor Management Relations Act, and that the strike, if permitted to be resumed, would "affect a substantial part of the atomic energy industry engaged in the production of goods for commerce." The preliminary injunction order which was issued, in addition to provisions necessary to terminate the work stoppage at Dunkirk, specifically protected the rights of individual employees against working without consent. The order directed petitioners to utilize the injunction period to engage in collective bargaining and to make every effort to settle the labor dispute, as contemplated by the national emergency provisions of the Labor Management Relations Act.

On the same day that the preliminary injunction was issued, petitioners appealed to the Court of Appeals for the Second Circuit, urging, first, that Section 208 of the Act is unconstitutional in that it imposes on the district courts functions which are not judicial within Article III of the Constitution, and, second, that the statute is not applicable to the facts of this case because the strike did not "directly" affect a substantial part of any industry to which the Dunkirk plant might belong, urging that the effect of the strike on a substantial part of the atomic energy industry is beyond the reach of the Act.[2/]

Immediately upon the docketing of their appeal in the court below, petitioners have sought expedited consideration of their petition, filed in this Court, for a writ of certiorari before judgment. In support of the request for expedited consideration, petitioners argue that the cause will become moot at the end of the statutory injunction period of 80 days. To support the request that this Court issue certiorari before judgment, "a power not ordinarily to be exercised" (see The Three Friends, 166 U.S. 1, 49; cf. United States v. Montgomery Ward

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2/ A third point on appeal, with regard to the coverage of the injunction, is mentioned but not argued in the petition and will not be discussed in this memorandum.

& Co., 324 U.S. 858), petitioners urge that "* * * the public interest will be promoted by prompt settlement in this Court of the questions involved." Rule 39.

We think that petitioners have failed to show that this case presents the exceptional and extraordinary circumstances which would justify the granting of certiorari before consideration by the Court of Appeals. The constitutional argument presented by petitioners is so patently lacking in merit that no review by this Court would appear to be warranted. And the question of statutory construction, which we think is also plainly without merit, is not of such overriding public importance as to warrant bypassing the Court of Appeals. This Court has in many cases emphasized the extent to which it is aided by having prior consideration and review by the courts of appeals. There is no reason why such review should be dispensed with in this case. The statutory contention urged here, assuming it can survive the plain language of the Act (see point 2, infra), has not yet been passed upon by any court of appeals. There is, of course, no conflict of decisions which must be resolved by this Court, and no showing that other cases are pending, or may be expected to arise, which involve the question. Nor is there any suggestion that the Court of Appeals would not proceed expeditiously to render a decision in this case. In these circumstances the Government submits that the petition for certiorari fails to set forth sufficient grounds for review of the district court's decision by this Court at this time.

1. Petitioners' argument against the constitutionality of the emergency labor dispute provisions of the Act is completely insubstantial. They do not question the validity of the provision as an exercise of the Congressional power to protect interstate commerce against serious interruptions. They urge, however, that the Government's suit seeking an injunction against the present strike does not present a justiciable "case" or "controversy," within the meaning of Article III of the Constitution, and that the statute purporting to confer jurisdiction

over this action is therefore unconstitutional. We submit that this contention can be regarded as substantial only if one disregards the history, purposes, and nature of the jurisdiction vested by Congress in the district courts by the Act.

In In re Debs, 158 U.S. 564, this Court upheld an injunction obtained by the Government against the Pullman strike of 1894, on the broad ground that "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other * * *." In 1932, the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. (Supp. V) 101-115) withdrew a large measure of this jurisdiction from the federal courts. In view of the experience during World War II with emergency-creating labor disputes, Congress decided that the Government must be given power to protect the public where labor disputes affected the national health or safety. See Section 1(b), Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. (Supp. I) 141(b). Accordingly, Congress removed part of the barrier to the exercise of a jurisdiction which, prior to 1932, had been exercised by the courts without express statutory authority. To prevent the recurrence of abuses which the Norris-LaGuardia Act was designed to eliminate, jurisdiction was limited to cases in which the national health or safety was affected, and the circumstances and conditions governing issuance of injunctions were carefully defined.

All the requisites of a justiciable controversy are present in this case. The United States brought this action to protect a substantial public interest which was endangered by the conduct of petitioners. The case arose in an adversary posture fully ripe for

decision. The court was empowered to grant or deny an injunction if it found certain facts to exist, i.e., that the "threatened or actual strike or lock-out---

> (i) affects an entire industry or a substantial part thereof engaged in * * * commerce, * * * among the several States * * * or engaged in the production of goods for commerce; and
> (ii) if permitted to occur or to continue, will imperil the national health or safety * * *." Section 208(a)

Such relief was enforceable against the parties. The proceeding in court was instituted and conducted throughout in judicial form subject to the ordinary rules of pleading and evidence. The judgment is final and is entered on the docket of the district court as of records And the statute provides review by the courts of appeals and this Court. Section 208(c).

It is difficult to conceive of any procedure and function more clearly judicial in nature. Cf. Tutun v. United States, 270 U.S. 568, 577. Petitioners contend, however, that "the issuance of an injunction must rest on a showing that the conduct to be prohibited is unlawful." It is not clear what petitioners mean by this contention. It cannot seriously be contended that jurisdiction under Article III is limited to cases involving criminal liability or liability for damages. Equitable causes of action are expressly recognized by Article III. Nor can it be contended that Congress lacks the power to vest the courts with jurisdiction to grant such equitable remedies as may be necessary and proper in order to deal with strikes which endanger the national safety.

The judicial character of the action to be taken is not lessened by the absence of other sanctions, or the failure to use the magic word "unlawful" in describing the conduct which may be enjoined. A legislature can vest its courts with jurisdiction to enjoin public nuisances; and the judicial nature of that

jurisdiction would not be defeated by the failure of the legislature to characterize such nuisances as "unlawful" or to provide other penalties or remedies.

Even if Article III did require jurisdictional statutes to declare conduct "unlawful" as a prerequisite to the granting of an injunctive remedy, the substance of any such requirement would be met by the present law, for in interpreting the Constitution substance rather than form is controlling. The very essence of the national emergency strike provisions of the Act is a legislative judgment that the conduct of the parties to a labor dispute in continuing a work stoppage of the sort reached by Section 208 injures substantial interests of the public, interests which are independent of and superior to the interest in preventing economic harm to the parties. The independent interest of the public thus threatened is its interest in protecting the national safety. And, we think, the concept of "unlawful" conduct includes conduct which Congress empowers a court to forbid because it endangers an interest of society.

Petitioners argue that Congress, in utilizing the injunctive remedy, can do so only in situations traditionally recognized as constituting equitable causes of action for injunctive relief; and that a traditional element to justify enjoining labor strife damaging to the national interest is an element of illegality, other than threat or damage to the national safety. But the Debs case squarely supports the proposition that courts traditionally have power to issue injunctions in situations like that presented in the instant case. Indeed, the Debs case is a fortiori here, for the public interest there involved was in the uninterrupted delivery of the mails, whereas this case involves

the far more important interest in the production of materials essential to the national defense in time of crisis. There can be no question that resort to injunctive processes, rather than to a criminal penalty or to a civil liability for damages, constitutes no more than a recognition that specific relief is the only possible effective protection against the incalculable loss of military, economic, and international position caused by a strike such as presented here.

Petitioners' second main constitutional contention is that Section 208 assigns to district courts a function which is legislative or administrative rather than judicial. Concededly, the case or controversy requirement of Article III would forbid such an assignment. But the suggestion that the function of the district court in the instant case is other than judicial is entirely without merit. The granting of injunctions is unquestionably a judicial function. And there is no question involved as to subsequent administrative or legislative modification of the court's judgment, as in Hayburn's Case, 2 Dall. 409, United States v. Ferreira, 13 How. 40, Gordon v. United States, 117 U.S. 697, or Chicago & Southern Air Lines v. Waterman S. S. Co., 333 U.S. 103.

The national emergency provisions of the statute do affirm the duty of parties to a strike to attempt to settle their differences, and provision is made for resort to the administrative procedures of mediation and conciliation during the period of injunction. Section 209. Even if, as petitioners contend, the use of Section 208 and the injunctive remedies is regarded as an implementation of the duty to mediate and settle labor differences by bargaining and negotiation, it would not follow that the grant

of an injunction is not the exercise of a judicial function. Congress can properly vest the federal courts with jurisdiction to issue such equitable relief as may be appropriate in the public interest to encourage peaceable settlement of labor disputes affecting the national welfare. Virginian Ry. v. System Federation, 300 U.S. 515, 549-553.[3/] Contentions similar to those advanced by petitioners here have been rejected by this Court in connection with the utilization of courts in aid of contracts to arbitrate. Marine Transit Corp. v. Dreyfus, 284 U.S. 263; cf. Red Cross Line v. Atlantic Fruit Company, 264 U. S. 109; Continental Grain Co. v. Dant & Russell, 118 F. 2d 967 (C.A. 9); Goldhill Trading & Ship. Co. v. Caribbean Ship. Co., 56 F. Supp. 31 (S.D. N.Y.).

The Act, it may be noted, also provides that, after the expiration of the injunctive period, the President shall refer the dispute, if not by then resolved, to Congress. Here again, petitioners cannot validly argue that subsequent action by Congress, after such reference, has any effect upon the finality of the court's judgment, so as to convert the court's function into forbidden legislative or administrative action. By the statute's very terms the injunction issued by the district court must have expired before the matter comes before Congress. And the statute does not contemplate Congressional review of the district court's proceeding. Rather, after the expiration of the 80-day maximum "cooling-off" period, in which efforts at settlement by way of conciliation and mediation must be made, Congress reserved the right to examine

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3/ The many cases in which courts enforcing the National Labor Relations Act have ordered collective bargaining are also in point.

the facts of the dispute to determine what, if any, further action in the public interest was required.

Finally, it is plain that the limitation of the injunction to a maximum period of 80 days does not render a proceeding in which it is granted non-judicial in character. No injunction is permanent in any absolute sense, 4/ and familiar equity practice always provides opportunity to the parties to move to modify or vacate injunctive orders. United States v. Swift & Co., 286 U.S. 106.

2. Petitioners' second argument is directed at the interpretation of Section 208 and seeks to impress upon that section a gloss greatly limiting the natural import of the plain statutory language. Section 208(a) gives the district courts jurisdiction to enjoin a threatened or actual strike or lock-out which it finds "affects an entire industry or a substantial part thereof * * *," and imperils "the national health or safety * * *." 5/

Petitioners concede that, as the district court found, the continuation of the strike will imperil the national safety. They do not challenge the finding that the strike affects a substantial part of the atomic energy industry. They are thus compelled to admit that the court's interpretation of the statute is permissible as "a matter of language" (Pet. p. 27). They claim, however, that when Congress referred to a strike or lock-out which "affects an entire

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4/ In this connection, it should be noted that Congress has full power to prescribe the use of permanent injunctions. Clearly, Congressional action is not invalidated where, as here, something less than its full power is exercised.

5/ There is no basis for petitioners' argument that the decision below or the Government's position makes the first requirement meaningless by making all strikes affecting the national health and safety enjoinable whether or not they affect "an entire industry or a substantial part thereof." Of course the statute requires that both conditions be met.

industry or a substantial part thereof," it actually intended to cover only a nation-wide strike in a nation-wide industry. Petitioners would construe Section 208(a) as if it gave the district courts jurisdiction over any strike which the court finds "is in an entire industry or a substantial part thereof." Under petitioners' construction, a strike could not be enjoined under Section 208(a) if it affected, in the ordinary sense of that word, an entire or a substantial part of an industry, if the strike itself were against a company or companies constituting less than an entire or a substantial part of an industry.

If Congress had in fact intended Section 208(a) to be so restricted in scope, the words it chose could hardly have been less apt. The difference between a strike which "affects an entire industry or a substantial part thereof" and one which "is in an entire industry or a substantial part thereof" was not too elusive for Congress to express, had it chosen to do so. In framing the Taft-Hartley Act Congress did not have to refer to the dictionary to ascertain the meaning of the word "affect." The significance of that word was as plain as day to those familiar with the history and construction of the comparable jurisdictional provisions in the National Labor Relations, Fair Labor Standards, and Federal Trade Commission Acts. Congress knew well the difference between "affecting commerce" and "in commerce." Section 2(7) of the National Labor Relations Act, both in its original form and as amended by the Taft-Hartley Act itself, defined the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The Fair Labor Standards Act and the original

Federal Trade Commission Act, on the other hand, did not confer such broad jurisdiction, and this Court had in many cases emphasized the crucial significance which attaches to the difference in the choice of statutory language adopted by Congress--a difference which petitioners now seek to obscure. Federal Trade Commission v. Bunte Brothers, 312 U.S. 349; Kirschbaum v. Walling, 316 U.S. 517; McLeod v. Threlkeld, 319 U.S. 492; 10 East 40th Street Co. v. Callus, 325 U.S. 578; and compare Polish Alliance v. Labor Board, 322 U.S. 643; Labor Board v. Denver Building Council, 341 U.S. 675; National Labor Relations Board v. Van Deusen, 138 F. 2d 893 (C.A. 2).

In their statement of points on appeal petitioners urge that the district court should have held the Act inapplicable here "because the strike involved does not directly affect an entire industry or a substantial part thereof." (Italics added.) Even if, as petitioners would have it, the word "directly" is to be inserted into the statute, the atomic energy industry would, in every meaningful sense, still be directly affected by a strike which prevents construction of atomic energy facilities. There is no more justification here than in Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41, for the Court to be "asked to shut [its] eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum." An effect can be direct even though it crosses industry lines. Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 221-222. In any event, Congress did not use the word "directly" in Section 208. Apart from any desire to avoid artificial restriction on the scope of the provision, Congress might have been dissuaded from using the phrase "directly affecting" because of the uncertainties and confusion which those words had previously engendered. Compare Carter v. Carter Coal Co., 298 U.S. 238, with Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31-32, Santa Cruz Fruit Packing Co. v. Labor Board, 303 U.S. 453, 466-467, Wickard v. Filburn, 317 U.S. 111, 119-120, 124-125, and Mandeville Farms v. American Crystal Sugar Co., 334 U.S. 219, 229-233.

Petitioners' argument is sought to be buttressed mainly by reference to illustrative remarks made during the course of debate. Attention during Congressional debate naturally tended to focus upon nation-wide strikes, not only because national emergencies were most familiarly caused by nation-wide strikes, but also because debate was conducted under "the urgency of the telephone and coal strikes of 1946." Frankfurter, J., in Youngstown Co. v. Sawyer, 347 U.S. 597, 598-599.

But these remarks referring to the most dramatic situations at which Section 208 was aimed could in no way justify a failure to give full effect to the clear language of the statute. It is elementary that that which is fairly embraced within the terms of a statute is not removed from its scope because it was not the particular situation which gave impetus to enactment of the law. Browder v. United States, 312 U.S. 335, 339-340. Indeed, an interpretation limited to the nation-wide strikes referred to in debate as illustrative would also be contrary to the broad purposes of the provision as recognized by the legislators in question. The objective of the provision was to find an effective means to cope with work stoppages affecting all or a substantial part of an industry and imperiling the national health or safety. The restrictive interpretation proposed by petitioners would frustrate the purpose of the statute; the peril to the nation results from the strike's effect, not its source. If a work stoppage, as in the instant case, affects all or a substantial part of a national industry and curtails the production

of a key article vitally needed for national defense, the application of the statute cannot be made to hinge upon whether it is manufactured in a vast number of factories spread over the land, or made in a single plant.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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